

The Honorable James L. Robart

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

MICROSOFT CORPORATION, a Washington  
corporation,

Plaintiff,

v.

MOTOROLA, INC., and MOTOROLA  
MOBILITY, INC., and GENERAL  
INSTRUMENT CORPORATION,

Defendants.

CASE NO. C10-1823-JLR

DEFENDANTS' MOTION TO FILE  
DOCUMENTS UNDER SEAL RE:  
OPPOSITION TO MICROSOFT'S  
MOTION FOR LEAVE TO FILE  
SUPPLEMENTAL DECLARATION

**NOTE ON MOTION CALENDAR:  
Friday, December 9, 2011**

**I. INTRODUCTION**

Pursuant to Local Rule CR 5(g)(2), Defendants Motorola, Inc. (now Motorola Solutions, Inc.), Motorola Mobility, Inc. and General Instrument Corporation (collectively, "Motorola") respectfully move this court for leave to file under seal the following:

1. Limited portions of Defendants' Opposition to Microsoft's Motion for Leave to File Supplemental Declaration of Christopher Wion in Support of Motion for Partial Summary Judgment (D.I. 112); and

2. Exhibit A to the Declaration of Kevin J. Post.

**II. BACKGROUND**

Microsoft Corporation ("Microsoft") and Motorola entered into a stipulated Protective Order, which was approved by the Court on July 21, 2011. ECF No. 72. This Protective Order

DEFENDANTS' MOTION TO FILE DOCUMENTS UNDER  
SEAL RE: OPPOSITION TO MICROSOFT'S MOTION FOR  
LEAVE TO FILE SUPPLEMENTAL DECLARATION - 1  
CASE NO. C10-1823-JLR

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1 outlines categories of material that should be maintained in confidence, along with procedures for  
 2 sealing confidential material when included in documents filed with the Court. Specifically,  
 3 paragraph 1 states that:

4 Confidential Business Information is information which has not  
 5 been made public and which concerns or relates to the trade secrets  
 6 . . . amount or source of any income, profits, losses, or expenditures  
 7 of any person, firm, partnership, corporation, or other organization,  
 8 the disclosure of which information is likely to have the effect of  
 causing substantial harm to the competitive position of the person,  
 firm, partnership, corporation, or other organization from which the  
 information was obtained. . . .

9 *Id.* at 1-2. This information should be marked as “CONFIDENTIAL BUSINESS  
 10 INFORMATION, SUBJECT TO PROTECTIVE ORDER.” *Id.* at 2. Additionally, paragraph 6  
 11 specifies that:

12 (1) Confidential Business Information pertaining to licensing or  
 13 other commercially sensitive financial information shall not be made  
 14 available under this paragraph 6 to such designated in-house  
 15 counsel; the supplier shall designate such Confidential Business  
 16 Information pertaining to licensing or other commercially sensitive  
 17 financial information as “[SUPPLIER’S NAME] CONFIDENTIAL  
 18 FINANCIAL INFORMATION – OUTSIDE ATTORNEYS’ EYES  
 ONLY – SUBJECT TO PROTECTIVE ORDER” and promptly  
 provide a redacted version of such document that may be  
 disseminated to the two in-house counsel designated under this  
 paragraph 6. . . .

19 *Id.* at 4. Finally, Paragraph 2 of the Protective Order governs the sealing of documents, and states  
 20 in relevant part that:

21 During the pre-trial phase of this action, such information, whether  
 22 submitted in writing or in oral testimony, shall be disclosed only *in*  
 23 *camera* before the Court and shall be filed only under seal, pursuant  
 to Rule 5(g) of the Local Civil Rules of the United States District  
 Court for the Western District of Washington.

24 *Id.* at 2.

25 Thus, the Protective Order provides that Motorola may request to seal documents by  
 26 formal motion pursuant to Local Rule 5(g). Local Rule CR 5(g)(3) states that:

1 If a party seeks to have documents filed under seal and no prior  
 2 order in the case or statute specifically permits it, the party must  
 3 obtain authorization to do so by filing a motion to seal or a  
 4 stipulation and proposed order requesting permission to file specific  
 5 documents under seal. The court will allow parties to file entire  
 6 memoranda under seal only in rare circumstances. A motion or  
 7 stipulation to seal usually should not itself be filed under seal. A  
 8 declaration or exhibit filed in support of the motion to seal may be  
 9 filed under seal if necessary. If possible, a party should protect  
 10 sensitive information by redacting documents rather than seeking to  
 11 file them under seal. A motion or stipulation to seal should include  
 12 an explanation of why redaction is not feasible.

13 Similarly, the Federal Rules of Civil Procedure recognize that courts should protect trade  
 14 secrets or other confidential commercial information by reasonable means, permitting the filing  
 15 under seal of documents containing such information. *See* Fed. R. Civ. P. 26(c)(1)(G) and (H)  
 16 (stating that a court may require that (1) “a trade secret or other confidential research,  
 17 development, or commercial information not be revealed or be revealed only in a specified way”  
 18 and (2) “the parties simultaneously file specified documents or information in sealed  
 19 envelopes . . .”).

20 Though courts recognize a general right to inspect and copy public records and documents,  
 21 including judicial records, the United States Supreme Court has stated that this right is limited.  
 22 “[T]he right to inspect and copy judicial records is not absolute. Every court has supervisory  
 23 power over its own records and files, and access has been denied where court files might have  
 24 become a vehicle for improper purposes.” *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 598  
 25 (1978). In discussing examples of improper purposes, the Court indicated that courts are not to  
 26 serve as “sources of business information that might harm a litigant’s competitive standing.” *Id.*

As the Ninth Circuit stated:

The law, however, gives district courts broad latitude to grant  
 protective orders to prevent disclosure of materials for many types  
 of information, including, but not limited to, trade secrets or other  
 confidential research, development, or commercial information. *See*  
 Fed. R. Civ. P. 26(c)(7). Rule 26(c) authorizes the district court to  
 issue “any order which justice requires to protect a party or person

from annoyance, embarrassment, oppression, or undue burden.”  
 The Supreme Court has interpreted this language as conferring  
 “broad discretion on the trial court to decide when a protective order  
 is appropriate and what degree of protection is required.” *Seattle*  
*Times Co. v. Rhinehart*, 467 U.S. 20, 36 (1984).

*Phillips v. Gen. Motors Corp.*, 307 F.3d 1206, 1211 (9th Cir. 2002).

### **III. THE PROTECTIVE ORDER BOTH PERMITS AND REQUIRES MOTOROLA TO FILE THIS MOTION FOR LEAVE TO SEAL**

In accordance with the Protective Order and the above-referenced authority, Motorola  
 moves to file the following documents under seal for the stated reasons:

#### **A. Limited Portions of Defendants’ Opposition to Microsoft’s Motion for Leave to File Supplemental Declaration of Christopher Wion in Support of Motion for Partial Summary Judgment (“Opposition”).**

Motorola respectfully requests that limited portions of its Opposition be filed under seal  
 because it describes confidential licensing arrangements between Motorola and a certain third  
 party. Because this information is contained in the Opposition, Motorola has marked this  
 document: “FILED UNDER SEAL: OUTSIDE ATTORNEYS’ EYES ONLY – SUBJECT TO  
 PROTECTIVE ORDER.” This information is highly confidential and proprietary business  
 information. Disclosure of this information to third parties and other party employees not covered  
 by the protective order would have the potential to lead to competitive harm. Declaration of  
 Kevin J. Post in Support of Defendants’ Opposition to Microsoft’s Motion for Leave to File  
 Supplemental Declaration and Defendants’ Motion to File Documents Under Seal (“Post Decl.”),  
 ¶ 5. In lieu of sealing the entire Opposition, Motorola has redacted only those portions of its brief  
 that disclose this highly confidential information. Redactions were made to as little information as  
 possible, leaving the remainder available for public review.

#### **B. Exhibit A to the Declaration of Kevin J. Post.**

Exhibit A to the Declaration of Kevin J. Post is the Declaration of Timothy Kowalski (“the  
 Kowalski Declaration”). The Kowalski declaration contains highly confidential information about  
 licensing negotiations between Motorola and a certain third party. The Kowalski declaration

describes the specifics of these ongoing licensing negotiations, including confidential communications between Motorola and this third party. Disclosure of this information to third parties and other party employees not covered by the protective order would have the potential to lead to competitive harm. Post Decl., ¶ 4. Because the sole purpose of the Kowalski declaration is to describe the details of this licensing negotiation, and because it contains confidential information throughout, the Kowalski Declaration should be sealed in its entirety. Post Decl., ¶¶ 3-4.

#### IV. CONCLUSION

For the foregoing reasons, Motorola respectfully requests that this Court order that the following documents be filed under seal:

1. Limited portions of Defendants' Opposition to Microsoft's Motion for Leave to File Supplemental Declaration of Christopher Wion in Support of Motion for Partial Summary Judgment (D.I. 112); and

2. Exhibit A to the Declaration of Kevin J. Post.

DATED this 28th day of November, 2011.

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**CERTIFICATE OF SERVICE**

I hereby certify that on this day I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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